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No. 93-647

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MAGNOLIA BAR ASSOCIATION, INC., *et al.*,
Petitioners,

V.

ARMIS E. HAWKINS, CHIEF JUSTICE OF THE SUPREME COURT OF MISSISSIPPI, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Petitioners, Magnolia Bar Association, Inc., et. al., file this Reply Brief, pursuant to Sup. Ct. Rule 15, to address issues first raised in Respondents' Brief in Opposition.

Contrary to respondents arguments, the reasons for granting the Writ are substantial.

REASONS FOR GRANTING THE WRIT

I.
THE QUESTIONS PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI WERE PRESENTED TO OR DECIDED BY BOTH THE DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Respondents argue that three of the five questions presented in petitioners' Petition for Writ of Certiorari were neither presented to nor decided by the United States Court of Appeals for the Fifth Circuit. [Brief in Opposition, pp. 4-5]. Specifically, respondents argue that petitioners advanced a contrary position in the District Court on the issue of whether total minority population or minority voting age population is the relevant inquiry when considering the first *Thornburg*[1] precondition. [Brief in Opposition, p. 4]. And, they argue that petitioners did not appeal the District Court's finding "that a new three-judge district having a black voting age population could be drawn in a north-south direction." [Brief in Opposition, p. 4]. Finally, respondents argue that petitioners failed to appeal or press the issues of: (1) whether a district court may properly consider totality of the circumstances evidence in deciding whether or not the three *Thornburg* preconditions have been met, and (2) whether the appellate court applied the proper legal analysis in deciding the issue of legally significant white bloc voting. [Brief in Opposition, pp. 4-5]. Respondents are wrong on all of those arguments for several reasons.

First, petitioners argued in the District Court that, in *Thornburg,* the Supreme Court indicated that "a black

[1] *Thornburg v. Gingles*, 478 U. S. 30 (1986).

majority population would be sufficient."[2] The District Court acknowledged the arguments when it held, "[i]t is important that, although *Thornburg* does not so expressly require, the Fifth Circuit has interpreted the first part of the tripartite test to require plaintiffs to show a majority of the *voting age* population in a single-member district, as opposed to a majority of the total population." [Supp. App. 36sa]. On appeal, the Fifth Circuit held that petitioners did not challenge the district court's findings that "blacks would not constitute a majority of the *voting age population* in any of the north-south multimember districts proposed by [petitioners]." (emphasis added) [Supp. App. 16sa].[3] This

[2]The above quotation is found in the arguments of counsel at the conclusion of the trial. [Trial Transcript, p. 328]. Relevant portions of the argument are set out here only because the respondents failed to include page 328 in their Appendix B to Brief in Opposition, p. 4a. The actual inquiry from the District Court on this issue and petitioners' response, as found on page 328 of the Trial Transcript, are:

THE COURT: Do you agree that a black majority voting-age population is the key?

MR. RHODES: The courts of appeals, *Dickinson* in Seventh Circuit and *Westwego* in Fifth Circuit have held that; but in *Thornburg*, the Supreme Court indicated that a black majority population would be sufficient. But the courts of appeals have said that it's voting age population that counts, and I agree that that's what the courts of appeals have established. When you challenge multi-member districts.

[3]Petitioners challenged, on appeal to the court of appeals, the district court's findings on the first *Thornburg* precondition on their vote fragmentation (line challenge) claim. Specifically, petitioners raised and briefed issues in the court of appeals concerning whether the district court erred in determining that petitioners could not create a black majority voting age population three judge district. [See, Appendix to Brief in Opposition, p. 3a, Issues 10, 11, and 12]. Petitioners argued below that a black majority voting age population three-judge district, running north to south, could be created using two split counties (but no split precincts). The district court held, however, that in satisfying the first *Thornburg* precondition, petitioners could not split counties. Petitioners argued below, and here, that split counties should be permissible in satisfying the first *Thornburg* precondition if minority voting age population is the relevant statistic. If, however, counties cannot be split in satisfying the first *Thornburg* precondition, then total minority population should be the relevant statistic. This Court had no need to pass upon

holding by the Fifth Circuit is limited to the factual findings and does not apply to the legal analysis employed by the District Court. The Fifth Circuit did not address the issue raised by petitioners of whether or not the District Court properly applied "the law to the facts proven by [petitioners] in the instant case." [Appendix to Brief in Opposition, p. 3a]. Consequently, the fourth issue contained in petitioners Questions for Review was presented to and decided by both lower courts. Even if the issue had not been presented in the Fifth Circuit, it is an important issue and the instant case presents an appropriate circumstance for this Court to address it. See, *Vance v. Terrazas*, 444 U. S. 252, 258-59, n. 5 (1980).

Second, petitioners presented to the Fifth Circuit questions of whether or not the District Court properly applied "the law to the facts proven," and whether or not the District Court's finding that "the election of Anderson and the election of Banks to the Mississippi Supreme Court were not aberrational but evidence that whites will not necessarily vote as a bloc for white candidates having black opponents in Mississippi Supreme Court elections so as to usually defeat the minority's preferred candidate" was clearly erroneous. [Appendix to Brief in Opposition, pp. 2a-3a]. Those issues closely parallel the first and second Questions Presented for Review in this Court. Those questions are important, and the instant case presents the appropriate circumstance to address them. *Id.*, at 258-59, n. 5. Even if the first and second Questions had not been raised or resolved in the lower courts, this Court "in exceptional cases coming here from the federal courts" review "questions not pressed or passed upon below..." *Duignan v. United States*, 274 U. S. 195, 200 (1927); *Youakim v. Miller*, 425 U. S. 231, 234 (1976) (per curiam). Assuming arguendo that the Questions were not squarely presented to or decided by the Fifth Circuit, the instant

this issue in *Growe v. Emison*, ___ U. S. ___ , 113 S. Ct. 1075, 1083, n. 4 (1993). The present case places the issue before the Court for resolution.

case would be an "exceptional case" requiring review for several reasons. First, the Questions Presented are not foreign to the subject matter of the complaint. Second, a clear conflict between the Circuit Courts of Appeals exists on the first Question. This Court held, in *Braxton v. United States*, ___ U. S. ___ , 111 S. Ct. 1854, 1858 (1991), that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the Circuit Courts of Appeals . . . concerning the meaning of provisions of federal law." The present case presents a conflict between the Fifth and Eleventh Circuit Courts of Appeals on an important issue of federal law. Finally, this "Court has 'the power to notice a 'plain error' though it is not assigned or specified." *Silber v. United States*, 370 U. S. 717, 718 (1962) (per curiam).

As such, the first, second, and fourth Questions Presented for Review are properly before this Court.

II.
ALL QUESTIONS PRESENTED ARE SUBSTANTIAL

Respondents argue that petitioners' third and fifth Questions Presented are not substantial. [Brief in Opposition, pp. 5-6]. Their arguments are misplaced. The third Question Presented gives this Court an opportunity to instruct lower courts on how evidence of the election of minority incumbents in racially polarized elections is to be weighed in determining legally significant white bloc voting. Although presently problematic for lower courts, this Question will be increasingly moreso as more minority incumbents are elected in jurisdictions with a history of severe racially polarized voting and voting rights litigation.

Regarding the fifth Question Presented, respondents argue that the Fifth Circuit did not substitute its judgment on findings of fact for the district court's. [Brief in Opposition, pp. 5-6]. Rather, respondents argue, the

Fifth Circuit corrected the district court's "misunderstanding of the governing rule of law." [Brief in Opposition, p. 6]. If respondent's assessment of the Court of Appeals' decision is correct, then the fifth Question Presented is substantially more important. The district court allowed petitioners to use "the entire state of Mississippi as the challenged election district" in order to prove the *Thornburg* preconditions on their vote fragmentation (line) challenge.[4] [Supp. App. 17sa-18sa]. The Fifth Circuit held that this was error because the existing multi-member districts were the appropriate districts to use in establishing the *Thornburg* preconditions on petitioners vote fragmentation (line) challenge. [Supp. App. 18sa]. This Court, just last term, in *Growe v. Emison*, supra, 113 S. Ct. at 1084, held that the *Thornburg* precondition analysis applies to vote fragmentation claims. The Court did not instruct lower federal courts, in *Growe*, how to conduct that analysis in such claims. Specifically, this Court did not instruct lower federal courts which districts were relevant in analyzing district specific evidence on the issue of legally significant white bloc voting. The fifth Question Presented invites this Court to instruct lower federal courts which districts are relevant in analyzing district specific evidence on the issue of legally significant white bloc voting.

[4]The Fifth Circuit held that petitioners presented three challenges under Section 2 of the Voting Rights Act, one - a challenge to the existing at-large method of election from multi-member districts, two - a challenge to the existing district lines, and three - a hybrid line-drawing/multimember challenge. [Supp. App. 4sa-18sa]. The District Court, on the other hand, found that petitioners presented only two challenges under Section 2 of the Voting Rights Act, one - a challenge to the existing at-large method of election from multi-member districts, and two - a challenge to the existing district lines. [Supp. App. 21sa-22sa, 43sa-78sa]. On Petitioners' line challenge, the district court correctly employed the *Thornburg* precondition analysis using the entire state as the district for obtaining district specific evidence of racially polarized voting. This challenge, after all, went to the entire state and not to just one segment.

III.
PETITIONERS DO NOT SEEK REVIEW OF EVIDENCE

Contrary to respondents arguments, [Brief in Opposition, pp. 9-10], petitioners are not asking this Court to review factual findings by the lower federal courts on the issue of legally significant white bloc voting. Petitioners merely ask this Court to announce principles setting forth the proper legal analysis to be employed by lower federal courts in determining legally significant white bloc voting. Petitioners third Question Presented is substantial.

IV.
PETITIONERS HAVE NOT MISSTATED THE FACTS OR EVIDENCE

Contrary to respondents arguments, [Brief in Opposition, pp. 10-13], petitioners have not misstated facts or record evidence. Regarding petitioners' argument that the existing Mississippi Supreme Court districts fracture an otherwise concentrated black population, the District Court acknowledged the presentation of such evidence by the petitioners. [Supp. App. 22sa, 66sa]. Petitioners made no contention during the trial and make none here that this fracturing is intentional. Rather, petitioners argued that this fracturing results in discrimination against black citizens and voters. Respondents are wrong in their assertion that the analysis of voting patters "of the trial court races" by petitioners' expert, Dr. Allan Lichtman, "was faulty." [Brief in Opposition, pp. 10-11]. The District Court found, based upon "substantial evidence that whites have voted as a bloc in elections for state trial judges," and that "whites in Mississippi generally vote as a bloc." [Supp. App. 74sa]. Regarding respondents' assertions that the district court accepted their expert testimony on the issue of racial bloc voting,

the assertions are wrong. Respondents submitted stipulated expert testimony, based upon an analysis of all contests - including white vs. white elections, that racial bloc voting did not exist in Mississippi elections. The district court rejected this testimony holding that "[e]lections that involve both black and white candidates are most probative of racially polarized voting," in general, [Supp. App. 39sa], and "white bloc voting" in particular. [Supp. App. 40sa]. Contrary to respondents' arguments, the appellate court did not discuss or consider the advantages Justice Banks enjoyed as an incumbent. [Supp. App. 15sa]. And, there was no proof presented, as respondents argue, that "it is highly unlikely that such engineering [as appointing blacks to the Supreme Court during litigation] could ever occur in races involving 1/3 of the state." [See, Brief in Opposition, p. 12, compare record, App. 1-60, Supp. App. 1sa-78sa]. Finally, respondents erroneously argue that "no anti-bullet voting requirement" is present in Mississippi Supreme Court elections, no evidence was presented that majority vote requirements disadvantage minorities, and that the district court found that petitioners had "abandoned their challenge to the numbered post feature of Supreme Court elections." [Brief in Opposition, p. 12]. Petitioners racial bloc voting evidence indicates a disadvantage African-American voters have with the majority vote requirement in white majority districts. [App. 4a-7a, 41a-42a]. The evidence also shows that an anti-bullet voting requirement is present in Supreme Court elections, Id. And, finally, the district court did not find that petitioners had abandoned their challenge to the numbered post feature of Supreme Court elections. [Brief in Opposition, p. 12]. The district court only held that petitioners "proof focused on the at-large, multimember aspects of the system and did not directly address the numbered post and staggered term features." [Supp. App. 43sa]. The District Court considered "the numbered post and staggered term features only insofar as they [were] implicated in a discussion of the at-large, multimember

features of the supreme court electoral system." [Supp. App. 43sa-44sa].

CONCLUSION

The Questions Presented in the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit are substantial. This Court should grant certiorari review of the Fifth Circuit's decision in this case.

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